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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO MARTINDALE, Defendant and Appellant.	B213695 (Los Angeles County Super. Ct. No. LA056510)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Alfonso Martindale was convicted by a jury of making a false bomb threat and criminal threats. On appeal, Martindale contends the trial court improperly responded to a jury question and challenges the sufficiency of the evidence. We affirm.

FACTS

On July 30, 2007, Martindale attempted to get a loan from the Valley Economic Development Center (VEDC), a non-profit company that provides training, business consulting, and lending for small businesses. When the loan officer told him he did not qualify for a micro-loan due to his poor credit history, he demanded to see a supervisor. He subsequently met with the president of the VEDC as well as its director of lending. Both told him he needed to clean up his credit issues before he could get a loan. Martindale became increasingly upset and told them that the VEDC was obligated to give him a loan because he paid taxes and worked for the federal government. VEDC's president gave Martindale a letter memorializing the reasons for declining his application -- delinquent credit obligations, collections, charge offenses, foreclosures, insufficient collateral and an incomplete business plan. Upon receiving it, Martindale cursed at him, and called him derogatory names and racial slurs.

As he was leaving, he screamed that when he finished with their building, "it would be level." The VEDC's receptionist, Joann Liddell, testified that she feared for her safety because she "didn't know what he was going to do. He had a briefcase. [She did not] know what was in that briefcase, and he was really acting crazy." The police were called soon after Martindale left the VEDC offices and they arrived 30 minutes later.

Meanwhile, Martindale began to call and harass Liddell. He told her that "he was going to blow up the building." She responded that "he is the reason that people look at us [i.e., African Americans] the wrong way and that he was acting very ignorant and that he needed to cut it out." He then asked for some things he left in the reception area. She told him the Van Nuys police had his things. He immediately settled down and asked, "Are you serious?" When he refused to stop calling, Liddell routed all calls to voicemail. Martindale left three or four voicemails with similar harassing messages.

Martindale was charged with maliciously informing another of a false bomb[1] (counts 1 and 2) and making criminal threats[2] (counts 3 and 4). (Pen. Code, §§ 148.1, subd. (c), & 422.)[3] Counts 1 and 3 were later dismissed at the prosecution's request.

At trial, the prosecution presented evidence of the facts summarized above. In his defense, Martindale testified that he became upset when the VEDC's president called him a "nigger" and said, "Your black ass isn't entitled to anything, and you just get your black ass out of my office." He said he never intended to harm or threaten anyone. Martindale also denied saying that he was going to blow up the building.

The jury found Martindale guilty on both counts. The trial court ordered Martindale to the Department of Corrections for a 90-day diagnostic report under section 1203.03. Thereafter, imposition of sentence was suspended and Martindale was placed on probation on various terms and conditions, including that he attend anger management counseling and psychological counseling. Martindale timely appealed.

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[1] Penal Code section 148.1, subdivision (c) provides: "Any person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime punishable by imprisonment in the state prison, or imprisonment in the county jail not to exceed one year."

[2] Penal Code section 422 provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

[3] All further section references are to the Penal Code.

DISCUSSION

I. Jury Instruction

Martindale contends the trial court erred in responding to a question by the jury. We disagree.

At closing, the jury was instructed that:

> "The defendant is charged in Count 2 with having made a false bomb threat. [¶] To prove that the defendant is guilty of this crime, the People must prove that:
> 1. The defendant willfully and maliciously informed a person, to wit: Joann Liddell;
> 2. That a bomb or other explosive device has been or will be placed or secreted in any public or private place;
> 3. That the defendant knew this information was false;
> AND
> Someone commits an act willfully when he does it willfully or on purpose, Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to defraud, annoy, or injure someone else."

During deliberations, the jury sent a question to the judge. With respect to the second element in the instruction, the jury asked, "Does 'blow up' qualify as bomb or explosive device[?]" The parties agreed to provide the jury with the following answer, drafted by the trial court: "Yes, if you find the defendant maliciously and willfully conveyed any words or conduct to another person and that person reasonably believed that this was a threat to use a bomb or explosive device, then such words or conduct qualify as a bomb or explosive device to prove element number 2 of the crime alleged in Count 2."

Martindale contends that the trial court's answer to the jury's question constituted prejudicial error because it relieved the prosecution of its burden of proof. "In essence, the jury asked the court that if Mr. Martindale said he would 'blow up' the parking lot, was element 2 true? The court's answer was direct: Yes."

As an initial matter, we note that both the doctrine of invited error and waiver apply here to preclude appellate review of the issue since Martindale specifically agreed to give the answer provided by the trial court. (*People v. Benavides* (2005) 35 Cal.4th 69, 114; *People v. Mays* (2007) 148 Cal.App.4th 13, 37.) However, because he argues ineffective assistance of counsel in the alternative, we will address the issue on the merits.

We find nothing in the court's response that relieved the prosecution of its burden to prove Martindale made a false bomb threat. Contrary to Martindale's selective excerpt, the trial court did not end its response with "yes." Instead, its answer required the jury to make factual findings that Martindale "maliciously and willfully" conveyed the words to Liddell and that Liddell reasonably believed that it was a threat to use a bomb or explosive device.

The trial court's response is similar to the one upheld in *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 315. There, the jury asked: " 'To be found guilty of the [offense of carrying a loaded firearm in a public place,] (1) must the defendant be on the sidewalk, or (2) is being on the driveway sufficient? (3) Define public place for us.' " (*Id.* at pp. 314-315.) The court answered: " '(1) No. (2) Yes. (3) The area in front of a home, including a private driveway, is a public place if it is reasonably accessible to the public without a barrier.' " (*Id*. at p. 315.) "[D]iscern[ing] nothing in the response that usurped the jury's factfinding function[,]" the First District instead found the instruction left the jury with the task of making essential factual determinations just as the trial court's response in this matter does. (*Id.* at p. 316.)

Relying on *Levin v. United Air Lines, Inc*. (2008) 158 Cal.App.4th 1002 (*Levin*), Martindale also takes issue with the reasonable belief requirement in the trial court's response, contending that "what the hearer believed is not legally relevant. . . ." We agree, as did the trial court, that Liddell's *personal* belief is irrelevant. However, the trial court imposed a *reasonable* belief standard. Martindale fails to identify how this additional reasonable belief standard prejudices him. In any event, *Levin* is easily distinguished since it involved a different subdivision of section 148.1.

II. Insufficient Evidence

Martindale also contends insufficient evidence supports the conviction for making a false bomb report. More specifically, he contends that "a statement about 'blowing up' a parking lot does not constitute a report that a bomb 'has been placed or will be placed or secreted' in a building." Further, "no substantial evidence showed that Mr. Martindale intended his statements to convey a false bomb report." We disagree.

Here, the jury found Martindale guilty of maliciously informing Joann Liddell that a bomb or other explosive had been or would be placed or secreted in any public or private place, knowing that the information was false. (§ 148.1, subd. (c).) As used in the Penal Code, the word " 'maliciously' " imports "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (§ 7, subd. 4.) Conviction under a statute proscribing an action done "maliciously" does not require proof of a specific intent. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Atkins* (2001) 25 Cal.4th 76, 85.) Instead, it " 'entails only an intent to do the act that causes the harm.' " (*People v. Atkins, supra,* at p. 86.)

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics deleted.) We are bound to give due deference to the jury and may not substitute our evaluation of the credibility of witnesses for that of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Although Martindale denied making any threats, Liddell testified at trial that Martindale told her he would "blow up" the building and "level" it. Liddell further testified that he was very upset. The jury also heard Liddell's 9-1-1 call, when she reported to the police that Martindale threatened to blow up their company. Another witness testified that Martindale appeared angry and she heard him say, "By the time I'm done with this place, it's going to be a motherfucking parking lot." In light of the facts and circumstances summarized above, the jury reasonably could conclude that

Martindale had or would place a bomb at the building and that he meant what he said. There is sufficient evidence of a false bomb threat.

DISPOSITION

The judgment is affirmed.

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BIGELOW, P. J.

We concur:

RUBIN, J.

LICHTMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.